



IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Cynthia Bostick, as Personal Representative of the Estate of Mark S. Bostick, Individually and on behalf of IRA FBO Mark S. Bostick Pershing LLC as Custodian Rollover Account, NFS/FMTC Rollover IRA FBO Mark S. Bostick  
Katina B. Fives  
William P. Fives  
  
Plaintiffs,  
  
vs.  
  
Berthel Fisher & Company Financial Services, Inc., Jerry McCutchen, and Concorde Investment Services, LLC.  
  
Defendants.

Case No.: \_\_\_\_\_

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COMPLAINT

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INTRODUCTION

Come the Cynthia Bostick, as Personal Representative or the Estate of Mark S. Bostick, Individually and on behalf of IRA FBO Mark S. Bostick Pershing LLC as Custodian Rollover Account, NFS/FMTC Rollover IRA FBO Mark S. Bostick; and Katina B. Fives and William P. Fives (hereinafter "Plaintiffs") by and through their attorney, and hereby file this Complaint against Defendants Berthel Fisher & Company Financial Services, Inc. (CRD #13609) ("Berthel Fisher"), Jerry McCutchen (CRD #1076678) and Concorde Investment Services, LLC (CRD# 151604) ("Concorde"). Mr. McCutchen is being added as a Defendant regarding the investments he placed while an employee at

Berthel Fisher and his wrongful activities as related to those investments following their placement. The Plaintiffs assert that they have suffered severe financial losses as a result of the Defendants' numerous violations of statutory, regulatory and common law duties owed to them. The Plaintiffs expressly reserve the right to amend this Complaint upon the ascertainment of additional facts, documents and information.<sup>1</sup>

### PARTIES

1. The Plaintiffs are listed above. At all times covered herein, the securities licensed registered representative for Berthel Fisher was Mr. Jerry McCutchen, a resident of Mobile County, Alabama and who is now upon information and belief relieved of all duties respecting the securities industry and is barred from ever entering the securities industry again due to the multiple violations similar to the claims herein.
2. Berthel Fisher is a broker/dealer, licensed by the Financial Industry Regulatory Authority ("FINRA"), now headquartered in the State of Iowa having been established, according to Berthel Fisher's website, in 1985 by a "group of independent-minded investment representatives" who were looking for a firm that "put the best interest of the representatives and their clients first." However, Berthel Fisher has been censured and fined \$775,000.00 by FINRA for violations exactly like the following complaints of Plaintiff (See Attachment A).
3. Defendant Jerry D. McCutchen was a registered representative who was licensed by FINRA member, Berthel Fisher, and due to his activities as financial advisor for Plaintiff

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<sup>1</sup> Plaintiffs originally were compelled by law to file this claim in arbitration with the Financial Industry Regulatory Authority, which they so did on to-wit August 17, 2018. Such claim was essentially voluntarily dismissed on May 7, 2019. Pursuant to the FINRA Code of Arbitration Procedure, the Plaintiffs have been authorized to file this court-based action. Also, said Code, relative to the applicable statutes of limitation discounts the period of time this case has pended in FINRA arbitration.

while serving in the line and scope of his employment with the corporate Defendant, the said corporate Defendant Berthel Fisher is liable under the doctrine of *respondant superior*.

4. Eventually, after Mr. McCutchen was removed by FINRA from the securities industry, his daughter, Meredith McCutchen took over many of his accounts (including the Plaintiffs' accounts). Meredith McCutchen worked with her father in Mobile, Alabama and then later moved to Concorde. Meredith McCutchen was likewise guilty of mishandling Plaintiffs' accounts, making Concorde responsible for her complained of misdeeds based on the doctrine of *respondant superior*. Meredith McCutchen did nothing to improve the wrongly constructed accounts of Plaintiffs, although there were avenues to rebalance or otherwise correct Plaintiffs' accounts. All events complained of herein occurred in Mobile County, Alabama.

### FACTS

5. As stated above, the registered representative who was the financial advisor, Jerry McCutchen, for Plaintiffs is no longer in the securities industry. Remarkably, upon information and belief based upon an investigation of Defendant McCutchen's activities including Mr. McCutchen's FINRA, Broker Check report, Mr. McCutchen has an astronomical 36 claims against him. During his employment with Berthel Fisher, Mr. McCutchen preyed upon older clientele/prospects as are the Plaintiffs. One maneuver for his ability to do this was that he was able to get an endorsement from Dave Ramsey, who is a nationally syndicated radio program host on *The Dave Ramsey Show*. Unlike Mr. McCutchen's approach, Mr. Ramsey is noted for his safe and no frills approach to investing and financial planning. During the course of Mr. Ramsey's show, he set up a

network of relationships with financial advisors including Jerry McCutchen. These financial advisors had a status entitled "Endorsed Local Providers" ("ELP"). However, Mr. Ramsey canceled his ELP designation of Jerry McCutchen once he learned of Mr. McCutchen's preying on older clientele and the risky investments chosen for his clients by McCutchen. Another basis for Mr. McCutchen's success was that he went on TV and radio being advertised as a financial advisor on "Ask the Expert." He further set up a company that was his d/b/a or "front" by the name of *Retiring with Dignity*. It is this name, *Retiring with Dignity*, that Defendant McCutchen used to appeal to older people with retirement funds, many of whom had sizeable lump sum accounts or funds with which to invest with Mr. McCutchen. Upon information and belief, it is estimated that approximately 90% of Defendant McCutchen's clientele, including Plaintiffs, were of retirement age or older.

6. Defendant McCutchen was sales agent, financial advisor, for NEXT Financial from May, 2003 until January, 2007. Then, beginning January 2007 he moved to Berthel Fisher. From 1983 until Mr. McCutchen's termination by Berthel Fisher, he was employed as a registered representative for 10 different broker dealers. Berthel Fisher became the brokerage firm for Plaintiff Bostick beginning in March 2010 and for Plaintiffs Fives beginning in December 2012. Eventually in about January of 2015, Meredith McCutchen moved to her employment with Concorde Investments Services, LLC. The two Plaintiffs allowed Ms. McCutchen to continue as their financial advisor.

7. It was the appeal that Mr. McCutchen established on "Ask the Expert" through his fraudulent but appealing company name, *Retiring with Dignity*, that caused Plaintiffs and others to seek out Mr. McCutchen. In Plaintiffs' initial meeting with Defendant McCutchen,

they told Mr. McCutchen that they were conservative investors. It was obvious from their age that they should have been conservative investors even if Mr. McCutchen had not been informed of same. A true professional financial advisor should automatically recognize that older clients should customarily be in conservative, liquid investments. Furthermore, the Plaintiffs had minimal knowledge regarding investing in securities, and more especially had no history, experience or a smattering of knowledge of the type of high risk investments that Mr. McCutchen always placed Plaintiffs and other clients in – private placements and Real Estate Investment Trusts (REITs), which are high risk, unconventional, illiquid, non-tradable, high commissioned products. (See Attachment B).

8. Mr. McCutchen followed the same format with every single one of his clients. He was a gifted talker who could “sell ice to Eskimos”. When his clients came to him, as unsophisticated as they were, they all wanted preservation of capital with some growth. Mr. McCutchen told everyone like it was a canned speech to just leave it to him; he repeated that he knew exactly what they wanted; his specialty was retiring individuals; he knew how to preserve their capital and take care of them; and he would always be on the lookout for any problem they had in their account (for which he charged a continuous management fee, in addition to commissions, based on the original principle investment amount regardless of the true depleted value). To the person, the Plaintiffs, including other customers, believed McCutchen. While at Berthel Fisher, quite unfortunately, rather than investing in the traditional and safe financial products that the Plaintiffs required, Mr. McCutchen and Berthel Fisher took steps to place the Plaintiffs in illiquid and speculative, high-risk investments which were not commensurate with the Plaintiffs’ financial profile. Particularly, Berthel Fisher, through its financial advisor Jerry McCutchen, placed the

Plaintiffs in unconventional, high risk products not understood by the Plaintiffs nor even the average citizen. Mr. McCutchen and Berthel Fisher were guilty of the above-mentioned which represented a pattern and practice of wrongdoing of many customers.

9. As was Defendant McCutchen's habit at Berthel Fisher, he placed all of his clients in essentially the same products - private placements, nontraded REITs, securitized debt and structured investments. These were actually the opposite type of investments the Plaintiffs and others needed. These were high commission products that paid a lot of money to the Defendant and Mr. McCutchen. But, based upon Mr. McCutchen's continuous, firm assurances that he was choosing investment products that were safe, conservative, and for preservation of principal, the Plaintiffs and many others allowed Defendant McCutchen to invest millions of dollars which were, by and large, all they had in the world.

10. During the course of Defendant McCutchen having handled these unconventional, alternative, high-risk, illiquid investments, Mr. McCutchen was able to hold all of his clients at bay by suppressing the truth about the Plaintiffs' investments. During the period of time of the investments being administered by McCutchen at Berthel Fisher, he and his staff member, Barbra, followed a standard script. Below is a partial list of the devices used by Mr. McCutchen to suppress the true nature of Plaintiffs' and others accounts with Mr. McCutchen:

- a. Mr. McCutchen and Barbra, when customers complained, would state there was nothing to worry about, that Mr. McCutchen had their back and if the worst happened and everything crashed, the clients would still have the real estate securing the debt in question. (This was an untrue lulling statement that was giving the clients false hope).

- b. Mr. McCutchen rarely returned phone calls. If anybody did, it was Barbra, who would lull the customers into ignoring any problem they had and just basically said, "leave the driving to us".
- c. Mr. McCutchen told a number of the customers, including the Plaintiffs upon their questioning their account statements, that there was nothing to worry about because he also had money in the investments in question. (This alone is a violation of most firms' compliance policy).
- d. Mr. McCutchen did nothing to rebalance these customers' accounts and did not look at any source to try to rectify his wrongs of putting them in illiquid assets.
- e. Mr. McCutchen's customers thought they were getting income, but they were actually, in many cases, getting checks for return of principal, which was never told to the clients.
- f. Mr. McCutchen not only got a handsome commission for selling these illiquid, alternative products involved, but he also charged a management fee. His management fee was placed upon all of the customers in addition to his commissions and other income. Mr. McCutchen used the original investment amount of each customer upon which to base his management fee. This further led his customers to believe that their original investment was not depleted as Mr. McCutchen and Barbra continued to assure them.
- g. Mr. McCutchen failed to monitor the market for these illiquid, structured alternative assets. During the course of the collapse of some of these investments, when the customers had virtually lost much of the money given to Mr. McCutchen, there was a secondary market (unknown to the customers) for these otherwise illiquid assets. Mr. McCutchen did nothing to attempt to liquidate same for the benefit of the customers, or even inform customers of such an option.
- h. During the history of the accounts, upon questioning by the customers about liquidating some of the illiquid assets, Mr. McCutchen would often state that they were liquid but it was not time to liquidate.
- i. Mr. McCutchen constantly told customers upon inquiry through his secretary, and when he was sometimes reached, that the customers could rest assured that they were properly placed in the investments at issue.

j. However, Berthel Fisher finally caught on to some of the violations of McCutchen. The CEO of Berthel Fisher in August, 2014, called in some of the customers one by one and attempted to reassure them that "all is well". In one such meeting, when the CEO found out Mr. McCutchen was over-charging clients for management fees, he openly criticized Mr. McCutchen in front of a client. Mr. McCutchen argued with the CEO and eventually jumped up and left. (This reflects Defendants' lack of supervision and lack of knowledge of the wrong doing of Mr. McCutchen all along).

11. Mr. McCutchen, and thus Berthel Fisher, in following a "one size fits all", have engaged in a pattern and practice with Plaintiffs and many other investors of unsuitable investing and failure to monitor which has proven hazardous to Plaintiffs' and many investors' earnings, portfolios, financial security and overall well-being. Meredith McCutchen in moving Plaintiffs to Concorde wrongfully continued the Plaintiffs in the unsuitable nontraditional investments with no liquidity and without even attempting rebalancing or adjusting Plaintiffs' unsuitable placement in the wrong investments.

**COUNT ONE**

**VIOLATION OF THE ALABAMA SECURITIES ACT**

1. The Plaintiffs repeat and re-allege each of the allegations above as though set forth fully herein.
2. Defendants' wrongful conduct, as alleged above, constitutes a violation of the Alabama Securities Act and the rules and regulations promulgated thereunder; Ala. Code § 8-6-19 et seq.
3. As a result of the wrongful and fraudulent conduct engaged in by the Defendants, the Plaintiffs have suffered damages in an amount according to proof, plus interest at the legal rate from the date of the wrongful conduct to the date of payment of an arbitration award is made, plus punitive damages and attorney's fees.

**COUNT TWO****BREACH OF FIDUCIARY DUTY**

4. The Plaintiffs repeat and re-allege each of the allegations above as though set forth fully herein.

5. By reason of the fact that Defendants acted as Plaintiffs' financial advisor and manager, Defendants owed a fiduciary duty to the Plaintiffs to act in the utmost good faith in dealing with Plaintiffs, including, but not limited to, the following: the duty to recommend investments only after studying and fully understanding them, the duty to inform the customer of the risks involved in purchasing the security, the duty not to misrepresent or omit any material fact to the transactions, the duty to act in the best interest of the Plaintiffs,<sup>2</sup> and the duty not to defraud or mislead the Plaintiffs, throughout Mr. McCutchen's handling of the accounts.

6. The Defendants breached each of these fiduciary duties.

7. As a result of the wrongful conduct engaged in by the Defendants, the Plaintiffs have suffered damages in an amount according to proof, plus interest at the legal rate from the date of the wrongful conduct to the date of payment that an arbitration award is made.

**COUNT THREE****BREACH OF CONTRACT**

8. The Plaintiffs repeat and re-allege each of the allegations above as though set forth fully herein.

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<sup>2</sup> The Uniform Prudent Investor Act confirms, in referring to fiduciary duty, "(m)anaging embraces monitoring."

9. The Defendants were obligated to provide the Plaintiffs with competent and professional services in accordance with the applicable industry rules, regulations, customs and practices of the industry. The brokerage contract in this case between Plaintiffs and Defendants provides for compliance with industry rules and regulations, a breach of those rules and regulations is a breach of contract.

10. The Defendants violated industry rules and regulations as alleged.

11. As a result of the wrongful conduct engaged in by the Defendants, the Plaintiffs have suffered damages in an amount according to proof, plus interest at the legal rate from the date of the wrongful conduct to the date of payment an arbitration award is made.

#### COUNT FOUR

##### MISREPRESENTATION, FRAUD AND FRAUDULENT SUPPRESSION

12. The Plaintiffs repeat and re-allege each of the allegations above as though set forth fully herein.

13. With respect to the investments at issue, in addition to Alabama's Blue Sky Law and pursuant to Ala. Code Sections 6-5-101, 6-5-102, 6-5-103, 6-5-104, the Defendants were under a duty to make full disclosure of all material facts for each of the subject transactions throughout Mr. McCutchen's handling and placement of the investments. Furthermore, the Defendants were under a duty to represent all facts related to the transactions in an honest and forthright manner. Defendants negligently and in some cases intentionally, failed to satisfy the legal requirement of reasonable disclosure. At times, Defendants intentionally suppressed the facts regarding the investments at issue.

14. As a result of the wrongful conduct engaged in by the Defendant, the Plaintiffs have suffered damages in an amount according to proof, plus punitive damages and

interest at the legal rate from the date of the wrongful conduct to the date of payment of an arbitration award is made.

**COUNT FIVE**

**UNSUITABILITY & FAILURE TO SUPERVISE**

15. The Plaintiffs repeat and re-allege each of the allegations above as though set forth fully herein.

16. FINRA Rule 2111 provides that members may only make suitable recommendations to customers based on their financial profile and all other relevant information pertinent thereto. Further, FINRA Rule 3130 provides that each member firm must have in place reasonable supervisory procedures to adequately monitor the business activities of its associated persons.

17. The Defendant, Berthel Fisher, breached each of said rules as alleged.

18. As a result of the wrongful conduct engaged in by the Defendants, the Plaintiffs have suffered damages in an amount according to proof, plus interest at the legal rate from the date of the wrongful conduct to the date of payment an arbitration award is made.

**COUNT SIX**

**NEGLIGENCE AND GROSS WANTONNESS**

19. The Plaintiffs repeat and reiterate each of the allegations above as if fully set out herein.

20. Plaintiffs claim further that the activities of the Defendants as mentioned above amounted to negligence and even wantonness for which Plaintiffs was proximately damaged.

21. As a direct and proximate result of the negligence and wantonness of the Defendants, Plaintiffs were damaged and hereby claims compensatory and punitive damages, plus interest.

**DAMAGES**

Based on all of the foregoing, the Plaintiffs respectfully hereby demand damages from the Defendants to compensate them in the amount to be determined, plus expenses, interest, reasonable attorneys' fees and punitive damages.

Dated: June 2, 2019

Respectfully submitted,



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Charles M. Thompson

**JURY DEMAND**

Plaintiffs hereby demand a trial by struck jury.

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**Please serve Defendants by Certified Mail at:**

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**Concorde Investment Services, LLC**  
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Suite 550  
Livonia, MI 48152

**Jerry McCutchen**  
5740 Riverview Plantation Drive  
Theodore, AL 36582

# ATTACHMENT A

FINRA Fines Berthel Fisher and Affiliate, Securities Management & Research, Inc., \$775,000 for Supervisory Deficiencies Related to Sales of Non-Traded REITs and Leveraged and Inverse ETFs



## News Release

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### A Fines Berthel Fisher and Affiliate, Securities Management & Research, \$775,000 for Supervisory Deficiencies Related to Sales of Non-Traded REITs and Leveraged and Inverse ETFs

Monday, February 24, 2014

Michelle Ong (202) 728-8464  
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WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined Berthel Fisher & Company Financial Services, Inc. and its affiliate, Securities Management & Research, Inc., of Marion, Iowa, a combined \$775,000 for supervisory deficiencies, including Berthel Fisher's failure to supervise the sale of non-traded real estate investment trusts (REITs), and leveraged and inverse exchange-traded funds (ETFs). As part of the settlement, Berthel Fisher must retain an independent consultant to improve its supervisory procedures relating to its sale of alternative investments.

Brad Bennett, FINRA's Executive Vice President of Enforcement, said, "A strong culture of compliance is an essential element of the proper marketing of complex products. Berthel's supervision of the sales of non-traded REITs, inverse ETFs and other products fell short of this standard, as it failed to ensure that its registered representatives understood the unique features and risks of these products before presenting them to retail clients."

FINRA found that from January 2008 to December 2012, Berthel Fisher had inadequate supervisory systems and written procedures for sales of alternative investments such as non-traded REITs, managed futures, oil and gas programs, equipment leasing programs and business development companies. In some instances, the firm failed to accurately calculate concentration levels for alternative investments, thus, the firm did not correctly enforce suitability standards for a number

ATTACHMENT A

FINRA Fines Berthel Fisher and Securities Management & Research \$375,000 for failure to adequately research or review leveraged and inverse ETF sales.

of the sales of these investments. Berthel Fisher also failed to train its staff on individual state suitability standards, which is part of the suitability review for certain alternative investment sales.

FINRA also found that from April 2009 to April 2012, Berthel Fisher did not have a reasonable basis for certain sales of leveraged and inverse ETFs. The firm did not adequately research or review non-traditional ETFs before allowing its registered representatives to recommend them to customers, and failed to provide training to its sales force regarding these products. The firm also failed to monitor the holding periods of these investments by customers, resulting in some instances in customer losses.

In settling this matter, Berthel Fisher and Securities Management & Research neither admitted nor denied the charges, but consented to the entry of FINRA's findings.

Investors can obtain more information about, and the disciplinary record of, any FINRA-registered broker or brokerage firm by using FINRA's BrokerCheck. FINRA makes BrokerCheck available at no charge. In 2013, members of the public used this service to conduct 16.5 million reviews of broker or firm records. Investors can access BrokerCheck at [www.finra.org/brokercheck](http://www.finra.org/brokercheck) or by calling (800) 289-9999. Investors may find copies of this disciplinary action as well as other disciplinary documents in FINRA's Disciplinary Actions Online database.

FINRA, the Financial Industry Regulatory Authority, is the largest independent regulator for all securities firms doing business in the United States. FINRA is dedicated to investor protection and market integrity through effective and efficient regulation and complementary compliance and technology-based services. FINRA touches virtually every aspect of the securities business – from registering and educating all industry participants to examining securities firms, writing rules, enforcing those rules and the federal securities laws, informing and educating the investing public, providing trade reporting and other industry utilities, and administering the largest dispute resolution forum for investors and firms. For more information, please visit [www.finra.org](http://www.finra.org).

# ATTACHMENT B

## REIT's (Real Estate Investment Trust)



A REIT is a security in a real estate property that may be traded similar to stocks and bonds on the stock exchange, or formed as a non-traded REIT. Berthel Fisher offers several portfolios of real estate investment trusts. Our REIT portfolios consist of (but are not limited to) large and small commercial properties, office buildings and residential estates.

REIT's are an investment vehicle used for investing in real estate. REIT's can be publicly traded with ticker symbols on an exchange, publicly registered but non-traded (illiquid and not on an exchange), or non-registered (Reg D).

REIT's allow investors to diversify their ownership of real estate by buying the public shares or investing in the operating partnership units which the REIT will then use to purchase real property. REIT's may be diversified (owning various real estate assets like office buildings, retail centers, industrial buildings, apartments or mortgage debt), or specific (office only, etc.).

REIT's must distribute 90% of their annual income to the investors to remain qualified as a REIT which allows for no taxation to the REIT at the corporate level. This avoids the double taxation issue. In addition REIT's provide a source of income to the investors on an annual basis as long as the REIT operates profitably. In some cases the distributions from the REIT may be reinvested in the REIT to purchase additional shares or operating partnership units.

REIT's are a way to help reduce risks of investing in real estate as well as diversifying an investor's portfolio while providing a source of income with the possibility of appreciation. Diversification can not eliminate the risk of investment losses. Berthel Fisher and Company has selling agreements with many of the prominent publicly registered non-traded REIT companies in the market today.

REIT's involve a high degree of risk and some of the more significant risks include: The value of shares of the trust will fluctuate with the portfolio of the underlying real estate related investments. Redemption will be at the price which may be more or less than the original price paid for units of the trust. There can be no assurance that a secondary market for the REIT will be maintained by the issuer. Therefore, there is risk that an investment in the REIT may be illiquid. The REIT is subject to risks such as potential conflicts of interests, risks associated with the lack of liquidity, lack of experience in operating a REIT, risks associated with the leveraging the investment, the special risks if investing in real estate such as market risk, interest rate risk, lease terminations, and potential adverse economic and regulatory changes.

*This does not constitute an offer to sell or a solicitation to buy any securities. An offer can only be made by a prospectus that contains more complete information on risks, management fees and other expenses. Read the applicable prospectus before you invest or send money. Consult the applicable prospectus or offering memorandum for suitability standards and minimum investments in your state.*

ATTACHMENT B

May - 2015